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No. 89-263

IN THE

SUPREME COURT OF THE UNITED STATES

August Term, 1989

MILTON A. CALESNICK and
ELEANOR J. CALESNICK, H/W,
Petitioners

v.

REDEVELOPMENT AUTHORITY OF THE
CITY OF PHILADELPHIA and
SUPERIOR COURT OF PENNSYLVANIA,
Respondents

BRIEF OF REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Chief Justice and Justices of the Supreme Court of the United States:

Respondent Redevelopment Authority of the City of Philadelphia ("RDA") respectfully requests that the petition for writ of certiorari of the petitioners, Milton A. Calesnick and Eleanor J. Calesnick, H/W (collectively "Calesnicks"), be denied for the reasons set forth herein.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the petitioners are entitled to review by the Supreme Court of a decision by the court of appeals affirming the trial court's dismissal of the petitioners'

claims on the basis of *res judicata* and collateral estoppel where the petitioners have litigated the same issues and claims in three prior actions?

2. Whether the petitioners are entitled to review by the Supreme Court of a decision by the court of appeals affirming the trial court's refusal to permit discovery on issues already determined against the petitioners by the trial court?

3. Whether the petitioners are entitled to review by the Supreme Court of the trial court's injunction against further litigation by the petitioners of issues and claims decided against them in four separate actions where the petitioners did not challenge the issuance of an injunction in the court of appeals?

JURISDICTION

The Supreme Court has jurisdiction to hear an appeal at its discretion from the final judgment of a court of appeals pursuant to 28 U.S.C. §1254(1) (1988).

COUNTER-STATEMENT OF THE CASE

In 1965, the Calesnicks acquired an antique house at 130 Delancey Street in Philadelphia and, in 1967, an adjoining unimproved lot at 132 Delancey Street from RDA. RDA's deeds to the Calesnicks contained a right of reverter which required that the Calesnicks complete restoration of the properties within a year after delivery of the deeds or title to the properties would return to RDA.[1]

In 1970, RDA commenced two actions against the Calesnicks in the Court of Common Pleas of Philadelphia County for return of the two properties because the Calesnicks failed to complete development in the five

1. All deeds from RDA contained similar restrictions in order to promote development and restoration rather than speculation on land value. The completion date is required by Pennsylvania law. 35 P.S. §1711(4)(1945).

years that passed after title was transferred to them. On February 28, 1973, the common pleas court permitted the Calesnicks to complete construction by February 28, 1974, but ordered that title to the properties would revert back to RDA if the Calesnicks did not complete restoration by that date. During 1974, the Calesnicks sought to transfer title to the properties to a third party named Selma Segal ("Segal"), apparently to avoid their development obligations. On October 10, 1974, the common pleas court set aside the purported transfer to Segal and vested title in RDA. Respondent Superior Court of Pennsylvania affirmed the trial court's orders.

In September of 1976, the Calesnicks filed a complaint in equity in the common pleas court to rescind the orders entered in the prior action and to recover possession of the properties, which was consolidated with RDA's 1970 actions. The Calesnicks alleged that RDA induced the common pleas court improperly to enter the order vesting title to the properties in RDA. On March 5, 1979, the Calesnicks and RDA entered into a settlement agreement to resolve both actions, which was embodied in a consent order issued by the common pleas court. Pursuant to the settlement agreement, the Calesnicks were required to submit plans for restoration of the properties to RDA for approval no later than April 5, 1979. Within 180 days after RDA approved the Calesnic's plans, the Calesnicks were required to complete exterior renovations. All interior renovations were to be completed no later than 450 days after RDA approved the plans. The parties then executed reciprocal deeds to be held in escrow by the common pleas court while the Calesnicks were permitted to complete their restoration work. The consent order also provided that the settlement agreement terminated all prior litigation between the parties.

In 1980, when the Calesnicks failed to complete restoration of the parties within the time permitted by the consent order, RDA moved to enforce the order and

recover possession of the properties. The common pleas court entered an order that the properties be returned to RDA on December 9, 1980. The Calesnicks requested reconsideration of the order and moved to rescind the settlement agreement embodied in the consent order on the basis of RDA's alleged fraud. The common pleas court denied the request for reconsideration and the motion for rescission.[2]

The Calesnicks appealed to the superior court, at which time they again alleged fraud on the part of RDA and the common pleas court arising out of the court's refusal to rescind the consent order. The superior court affirmed the orders of the common pleas court and the Supreme Court of Pennsylvania declined to hear the Calesnicks' further appeal.

While the Calesnicks' appeal to the superior court was pending, they commenced their first action in the United States District Court for the Eastern District of Pennsylvania, in which they alleged that their constitutional and civil rights were violated by a "grand conspiracy" between RDA and a host of public officials to deprive them of their properties.[3] The district court entered summary judgment in favor of RDA on the basis that the Calesnicks had already litigated their claims in the prior state court actions. The district court's judgment was affirmed by the United States Court of Appeals for the Third Circuit.

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2. The Calesnicks simultaneously commenced another action in the common pleas court in July of 1980 to modify the March 5, 1979 consent order. That action was dismissed by the common pleas court on October 22, 1980.

3. The Calesnicks alleged that RDA brought unfounded actions against them in the Pennsylvania courts, caused improper entries to be made upon the court dockets, and fraudulently induced them to enter into the consent agreement. In addition, the Calesnicks alleged that RDA had seized certain equipment and materials which they had been using on the properties.

The Calesnicks brought another action in the district court in 1985, this time against the Commonwealth of Pennsylvania, the Supreme Court of Pennsylvania, and the Superior Court of Pennsylvania, seeking to have the superior court's judgment invalidated. The district court dismissed the Calesnicks' collateral attack on the superior court's judgment for failure to state a cause of action.

Not content with the district court's determination, the Calesnicks commenced yet another action in the common pleas court in October of 1985, in which they sought collateral review of the orders entered in the 1970 and 1976 consolidated actions because of various alleged irregularities in the proceedings before the common pleas court. Ultimately, the trial court dismissed the Calesnicks' complaint on the basis of *res judicata* and collateral estoppel. The Superior Court of Pennsylvania affirmed the trial court's decision and the Supreme Court of Pennsylvania refused to allow a further appeal.

In 1986, the Calesnicks sought leave to file original process in the Supreme Court of Pennsylvania, alleging that they were unable to obtain fair and unbiased review of their claims in any other state court. The supreme court denied the Calesnicks' request on November 18, 1986.

The Calesnicks then commenced this action in the district court on February 23, 1988, repeating their allegation that RDA and the superior court participated in a fraudulent scheme to deprive them of the real property on Delancey Street. The Calesnicks sought money damages from RDA for the alleged fraud and sought to set aside the judgment of the superior court affirming the orders of the common pleas court. On May 17, 1988, the district court granted RDA's motion for summary judgment and dismissed with prejudice the Calesnicks' complaint against RDA and the superior court. On May 18, 1988, the district court entered judgment in favor of RDA and the superior court and

against the Calesnicks. Thereafter, the district court vacated its order and judgment *solely to provide a hearing on RDA's motion for an injunction against the Calesnicks and its application for counsel fees.* The Calesnicks sought to transfer their action to the United States District Court for the District of Columbia which was denied. The Calesnicks failed to appear at the first hearing on RDA's motion and application and after the hearing was postponed the Calesnicks attempted to discontinue their action. The discontinuance was denied and a hearing was held on June 21, 1988. On August 17, 1988, the Calesnicks served interrogatories and a request for production of documents upon RDA, purporting to inquire into the alleged fraudulent docket entries and transfer of title to the properties. RDA moved the district court for a protective order precluding the Calesnicks' discovery.

On September 28, 1988, the district court reinstated its orders dismissing the Calesnicks' action against the superior court and granting RDA summary judgment against the Calesnicks. The district court also enjoined Milton A. Calesnick "from filing any new action or proceeding in any court, state or federal, against any person, court, authority or any other entity in any way involved in the purchase, sale, or development" of the Delancey Street properties. Finally, the district court awarded RDA attorneys' fees in the amount of $8,102.44 against the Calesnicks.[4]

The district court's judgment was affirmed by the court of appeals.[5] The Calesnicks sought reconsidera-

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4. The district court's decision rendered RDA's motion for a protective order moot and no decision was made thereon.

5. The Calesnicks did not raise the propriety of the district court's injunction against further litigation or the award of attorneys' fees in their appeal or request for reconsideration by the court of appeals.

tion in the court of appeals, which was denied. This petition for writ of certiorari followed.

SUMMARY OF ARGUMENT

Mere hyperbole and vituperation do not give constitutional dimension to the fanciful arguments of disgruntled *pro se* litigants. Identical issues and claims have been raised by the Calesnicks and have been decided by the courts four times. The federal and state courts have given the Calesnicks ample opportunity over two decades of protracted litigation to present their arguments and have consistently ruled against them. The Calesnicks have not been denied their day in court. Undaunted, the Calesnicks have engaged in a pernicious crusade against RDA without legal or factual foundation. The Calesnicks have caused RDA to incur substantial legal fees and have burdened already strained judicial resources with their parade of lawsuits. Were he not enjoined, Milton Calesnick would continue to harass RDA and expose it to endless, unnecessary expense through vexatious litigation. The Constitution and the laws of the United States do not require or permit such waste to continue.

REASONS FOR DENYING THE WRIT

Review by the Supreme Court of the judgment of a court of appeals on writ of certiorari is reserved only for those cases which present "special and important reasons" for such review. Supreme Court Rule 17.1 (1984). Since this case presents no principle of which is of importance to the public as distinguished from the parties, the Supreme Court need not review the judgment of the court of appeals.

I. The Petitioners' Claims Are Barred By Operation Of The Doctrines Of Res Judicata And Collateral Estoppel

The related doctrines of *res judicata* and collateral estoppel are based upon the sound jurisprudential principle that while a party may be entitled to seek relief for alleged wrongs, he or she may only do so once and, having been given the opportunity to do so, may not be heard to complain of the same wrongs in some later proceeding. It has been noted:

> the judicially-created doctrines of *res judicata* and collateral estoppel are recognized in order to support policies of relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, preventing inconsistent decisions, and encouraging reliance on adjudications.

David H. Bathe, "Supreme Court's Views as to Res Judicata or Collateral Estoppel Effect of State Court Judgments on Federal Courts", 72 L.Ed. 2d 911, 914 (1982).

Collateral estoppel, the narrower of the two doctrines, is often thought of as "issue preclusion"; indeed, the Supreme Court has long held that when an ultimate issue of fact has been once decided by a valid, final judgment, that issue may *not* be relitigated again. *See, e.g., Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n. 5 (1979); *Southern Pacific Ry. Co. v. United States,* 168 U.S. 1, 48-49 (1897). There is agreement among the federal circuits that issues once decided may not be relitigated. *See, e.g., GAF Corp. v. United States,* 818 F.2d 901 (D.C. Cir. 1987); *United States v. Levy,* 803 F.2d 1390 (5th Cir. 1986); *Purter v. Heckler,* 771 F.2d 682 (3d Cir. 1985); *Walton Motor Sales, Inc. v. Ross,* 736 F.2d 1449 (11th Cir. 1985); *United States v. DiBona,* 614 F.Supp. 40 (E.D. Pa. 1984).

Res judicata is a broader doctrine than collateral estoppel. While collateral estoppel requires that an issue

actually be litigated in a prior action, *res judicata* extinguishes all claims actually litigated *and* those which *could have been* litigated in a prior action. *Cromwell v. County of Sac,* 94 U.S. 351, 352 (1877); *Wade v. City of Pittsburgh,* 765 F.2d 405 (3d Cir. 1985). *Res judicata* is frequently described, therefore, as "claim preclusion." Most courts apply a transactional approach to determine the scope of *res judicata,* so that a prior judgment extinguishes all rights of a plaintiff to remedies against the defendant with respect to all or any part of a transaction or series of transactions out of which the original claim arose. *Harnett v. Billman,* 800 F.2d 1308 (4th Cir. 1986), *cert. denied,* 480 U.S. 932 (1987); *Car Carriers, Inc. v. Ford Motor Co.,* 789 F.2d 589 (7th Cir. 1986); *Manego v. Orleans Board of Trade,* 773 F.2d 1 (1st Cir. 1985), *cert. denied,* 475 U.S. 1084 (1986); *Carbonaro v. Johns-Manville Corp.,* 526 F.Supp. 260 (E.D. Pa. 1981); *aff'd,* 688 F.2d 319 (3d Cir.), *and sub nom. Johns-Manville Corp. v. Celotex Corp.,* 688 F.2d 821 (3d Cir. 1982).

In *Gregory v. Chehi,* 843 F.2d 111 (3d Cir. 1988), the Third Circuit discussed the distinction between the two related doctrines. The court stated that *res judicata,* or claim preclusion, bars a second action if a prior action shares four identities:

(1) the same thing sued upon;

(2) the same cause of action;

(3) the same parties; and

(4) the same capacities of the parties.

Chehi, 843 F.2d at 116 (citations omitted). Collateral estoppel, or issue preclusion, bars a second action if the following four other identities are present:

(1) identical issues as those decided in a prior action;

(2) final judgment entered in the prior action;

(3) the plaintiff was a party or in privity with a party in the prior action; and

(4) the plaintiff had a full and fair opportunity to litigate the issues in the prior action.

Chehi, 843 F.2d at 121 (citations omitted). The *Chehi* decision correctly states the law in this regard, and was applied by the district court as well as the court of appeals to the underlying claims of the Calesnicks.

For purposes of collateral estoppel and *res judicata,* the law is clear and well-settled that summary judgment or a judgment on motion constitutes a final judgment on the merits. *Spiegel v. Continental Illinois Nat'l Bank,* 790 F.2d 638 (7th Cir.), *cert. denied,* 479 U.S. 987 (1987) (judgment against plaintiff for failure to state a cause of action); *Jackson v. Hayakawa,* 605 F.2d 1121 (9th Cir. 1979), *cert. denied,* 445 U.S. 952 (1980), *appeal after rem.,* 682 F.2d 344 (9th Cir. 1982), *and appeal after rem.,* 761 F.2d 525 (9th Cir. 1985); *Springer v. Seaman,* 658 F.Supp. 1502 (D. Me. 1987); *Blythe Industries, Inc. v. Puerto Rico Aqueduct and Sewer Authority,* 607 F.Supp. 1386 (S.D.N.Y. 1985). Similarly, a consent judgment is also given the same conclusive force and effect as if it were a final judgment on the merits. *Baren v. Baren,* 166 Pa. Super. 532, 72 A.2d 623 (1950).

Finally, because the federal courts are required to give full faith and credit to state court judgments, prior state judgments, even in cases involving federal questions, are entitled to the same preclusive effect in a subsequent federal action as they would be entitled in other courts in the state where the judgments were rendered. 28 U.S.C. §1738 (1988); *Migra v. Warren City School Board of Education,* 465 U.S. 75 (1984) (prior state judgment barred civil rights claim in later federal actions); *Kremer v. Chemical Construction Corp.,* 456 U.S. 461 (1982); *Allen v. McCurry,* 449 U.S. 90 (1980).

The Calesnicks' underlying complaint fits well within the tests reaffirmed by this Court in *Chehi*. In applying the test for collateral estoppel, there is no dispute that final judgments were entered and that all appeals were exhausted in the various prior actions. Nor is there any dispute that the Calesnicks were parties to the prior actions and had full opportunity to litigate the issues which they raised in the district court in those prior actions. The only real inquiry left for the district court was whether the same issues had been decided in the earlier litigation.

The district court correctly concluded that the issues raised by the Calesnicks' complaint had already been decided. The only "facts" alleged in the complaint were: (1) that RDA tampered with the docket entries of the 1970 actions to show a conveyance of title to the properties to it on October 18, 1974; (2) that RDA used its fraudulent claim of ownership to take possession of the properties and certain construction equipment thereon; and (3) that RDA fraudulently induced the Calesnicks to enter into the agreement memorialized by the consent order. The Calesnicks also alleged that the superior court joined in RDA's fraudulent scheme when it refused to restore ownership of the properties to the Calesnicks.

All of these facts had been raised and litigated in the prior actions. Indeed, in 1985 the district court concluded that the factual issues in the Calesnicks' first federal action, which were virtually identical to the issues in second federal action (*i.e.*, the underlying complaint), had been decided by the state courts. In the interim, the Calesnicks tried to re-litigate the identical factual issues back in the state court. However, the superior court dismissed the Calesnicks' 1985 state action on the basis of the prior litigation, including the federal action.

To circumvent the impediments of *res judicata* and collateral estoppel, the Calesnicks claim that the issues

raised in the two federal actions were completely different.[6] Nonetheless, the Calesnicks have *admitted* that the alleged fraud committed by RDA was revealed to the common pleas court and to the superior court, that RDA's fraud and the invalidity of the prior judgments were disclosed to the district court in the prior related action, and that the entire alleged fraudulent scheme was documented to the common pleas court when the Calesnicks moved to "rescind" the consent order.

There is no better proof that all of the issues and claims advanced by the Calesnicks in this action were, or could have been, litigated before than the Calesnicks' own admissions. At the hearing on RDA's motion for an injunction and request for counsel fees, counsel for RDA specifically questioned Milton A. Calesnick about the action commenced for leave to file original process in the Supreme Court of Pennsylvania in 1986. Mr. Calesnick admitted that they alleged in the application for original process that the superior court's order of July 22, 1983, deprived the Calesnicks of their right to fair and unbiased appellate review, that the order was fraudulent, that RDA and the superior court criminally altered docket entries, that RDA's claim of ownership of the Delancey Street properties was fraudulent, and that the superior court also defrauded the Calesnicks out of title to the properties. Most importantly, Mr. Calesnick stated:

> It isn't that I haven't had a chance to present my arguments to the court. It's whether the courts listened. It's whether the courts are unbiased. It's

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6. The Calesnicks describe the underlying federal action as a "collateral attack" upon the superior court's 1980 judgment. They claim that their prior complaint in the federal court alleged that state courts (including the superior court) failed to consider issues raised before them. Assuming, *arguendo*, that there were such a distinction, the collateral attack would also be barred by *res judicata* or collateral estoppel. *See* pp. 14-16 *infra*.

> whether they will accept facts or turn their head and make up their own opinion as to what they heard and what decisions they would like to present.

This single statement by Mr. Calesnick belies any contrary argument that all of the Calesnicks' claims have not been heard by the courts, or that the Calesnicks have not had any opportunity to present their argument to the courts, in all of the prior actions.

Not only have these issues been litigated and decided, but two courts had already concluded that the Calesnicks' claims arising out of the sale and development of the properties were barred by *res judicata* or collateral estoppel before the Calesnicks commenced this action. On July 25, 1985, the district court dismissed the Calesnicks' first federal action on the basis of the prior state proceedings, which the federal court concluded were correct in all respects. Then, on June 29, 1987, the superior court dismissed the Calesnicks' second state action on the basis that their claims had already been resolved.

It is clear that the Calesnicks had already litigated every claim which they asserted in the district court against RDA and the Superior Court. Even if the same issues had not been decided in the prior adjudications, the Complaint is barred by *res judicata* because the Calesnicks had ample opportunity to raise all of their claims in the 1970 actions and the ensuing 18 years of litigation. Every complaint ever filed by the Calesnicks has concerned their claim of title to the Delancey Street properties. The transactional application of the doctrine of *res judicata* removes all doubt that the claims are, or should have been resolved. All of the Calesnicks' claims derive from the transfer of title to 130-132 Delancey Street, whether the specific claim is predicated on allegations of fraudulent docket entries or fraudulent inducement into the Consent Order or otherwise. As the Court noted in *Chehi,* the "transaction remains unitary

'although the several legal theories depend on different shadings of the facts, or would emphasis different elements of the facts, or would call for different measures of liability of different kinds of relief.' " *Chehi,* 843 F.2d at 111 (*citing* Restatement (Second) of Judgments §24(1)(1982)).

The Calesnicks attempt to distinguish this action from all of the prior litigation by characterizing it as a collateral attack upon the Order of the Superior Court dated July 22, 1983. Not surprisingly, the Calesnicks had already commenced a collateral attack upon the decision of the superior court in the district court in 1985. There again, the district court refused to interfere with the judgment of the various Pennsylvania state courts. The district court stated:

> To address this contention [of the Calesnicks that the superior court judgment was defective] would necessarily involve [the district] court in an investigation of the internal decision making processes of the Pennsylvania Superior Court and the Pennsylvania Supreme Court and the method by which individual judges and justices on those courts arrive at their decisions.

Calesnick, et ux. v. Commonwealth of Pennsylvania, et al., C.A. No. 85-1381, slip op. at 8 (E.D. Pa. June 18, 1985). The district court declined to invade the province of the state courts and concluded that the Calesnicks failed to state a cause of action upon which relief could be granted. Were the Supreme Court to accept the Calesnicks' characterization of the present action, it is nonetheless clear that the same claim has already been rejected by the district court in 1985 and should be barred in this action.

Moreover, the Constitution does not reach to the proportions sought by the Calesnicks. In the absence of intentional discrimination (which the Calesnicks have never alleged), the Fourteenth Amendment does not

protect litigants against "judicial error." *Beck v. Washington,* 369 U.S. 541, 554-55 (1962) (*quoting Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee,* 252 U.S. 100, 106 (1920)). *See also United States v. Wallace,* 448 F. Supp. 164 (E.D. Va. 1978); *Brosten v. Schuler,* 360 F. Supp. 608 (N.D. Ill. 1973); *Burton v. Peartree,* 326 F. Supp. 755 (E.D. Pa. 1971). Indeed, appellate review is not a constitutional mandate. *Lindsey v. Normet,* 405 U.S. 56 (1972). If a state provides appellate rights, the due process clause of the Fourteenth Amendment requires only that the procedure for seeking an appeal and consideration of the appeal are neither arbitrary nor unfair. *Pennywell v. Rushen,* 705 F.2d 355 (9th Cir. 1983); *Sareles v. Sheehan,* 326 F.2d 490 (7th Cir. 1963), *cert. denied,* 377 U.S. 932 (1964).

The Calesnicks seek to have the federal district court sit as a "super-appellate" court to review the propriety of all prior state court decisions, whether rendered at the trial, intermediate appellate, or final appellate level. Such a task should not be undertaken in the absence of a denial of due process. *MGA, Inc. v. General Motors Corp.,* 827 F.2d 729 (Fed. Cir. 1987), *cert. denied,* 108 S.Ct. 705 (1988) (the principles of collateral estoppel and *res judicata* apply if the alleged errors do not rise to the level of due process violation); *Krison v. Nehls,* 767 F.2d 344 (7th Cir. 1985) (civil rights statute does not permit relitigation of federal issues after full and fair hearing in the state court).

The Calesnicks were given every opportunity in the prior actions to raise the same issues and claims which they have made in this case. They have confused the fact that the prior actions were decided against them for the courts' alleged failure or refusal to consider the issues or claims. On that ill-founded basis, the Calesnicks ask the Supreme Court to require that the superior court's judgment be reviewed. However, it has been held that:

> the federal constitution has never been held to regulate the reading and research that a judge must accomplish or the mental processes that he must follow in reaching a decision. The method by which decisions are made is within the area of judicial discretion, being regulated neither by statute nor constitution.

Griffin v. Seismic Services, Inc., 353 F. Supp. 989, 990 (E.D. La. 1973) (citations omitted).

The Calesnicks' characterization of this action as a collateral attack upon the validity of the superior court's judgment does not warrant review by the Supreme Court of the judgment of the court of appeals.

II. The Petitioners Are Not Entitled To Discovery On Matters Determined Against Them By The Entry of Summary Judgment In Favor of The Respondent

Federal Rule of Civil Procedure 26 clearly defines the scope of discovery in all federal actions:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1)(1970). Although permissive in scope, Rule 26 is not without its limits. It is clear that matters *not* at issue before the federal courts may *not* be the subject of discovery inquiries. It is equally clear and well-settled that the district courts have wide discretion to determine the scope of discovery. *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81 (3d Cir. 1987); *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir. 1986).

The Calesnicks sought to discover information about the 1974 docket entries in the common pleas court in support of their underlying claim of fraud. This discovery was sought *after* the district court had already determined that summary judgment would be entered in favor of RDA on the basis of *res judicata* and collateral estoppel. The only matters remaining before the district court were RDA's right to an injunction prohibiting the Calesnicks from bringing future litigation arising out of the sale and development of the Delancey Street properties and to an award of attorneys' fees against the Calesnicks.

The Calesnicks imply that counsel for RDA made an issue of the 1974 docket entries by offering into evidence an amended order of the common pleas court dated October 10, 1974, at the injunction and fee hearing. In fact, the order of October 10, 1974, was *not* offered into evidence, although Mr. Calesnick *admitted* that such an order was signed by the trial judge in the original state court action. Mr. Calesnick also testified that he requested reconsideration of the very order the validity of which is now in question, and the request was denied. Finally, Mr. Calesnick testified that he commenced the 1976 state court action alleging, *inter alia*, that the trial judge signed the October 10, 1974, order "in the middle of the night" and that the order was never entered upon the common pleas court's docket for the 1970 action. After the 1976 action was consolidated with the original state action, the Calesnicks and RDA agreed to the entry of a consent order resolving all issues between the parties.

In *Westminster Investing Corp. v. G.C. Murphy Co.*, 434 F.2d 521 (D.C. Cir. 1970), the Court of Appeals for the District of Columbia Circuit confronted a discovery issue identical to the one raised by the Calesnicks. Westminster owned property in Washington which it

leased to Murphy. Westminster sued Murphy for damages caused during riots which followed the assassination of Dr. Martin Luther King in April of 1968. Murphy impleaded the District of Columbia as a third-party defendant, alleging that the District failed to provide adequate police protection against the riots. While Murphy was taking the depositions of District of Columbia officials, the trial court dismissed the third-party complaint for failure to state a claim on which relief could be granted. The trial court also cut off Murphy's right to complete the proposed depositions. The court of appeals affirmed the discovery ruling on the basis that "[p]rolongation of the controversy would be wasteful and useless" in light of the dismissal. *Westminster*, 434 F.2d at 526.

For much the same reason, the Calesnicks are not entitled to the discovery which they seek. The district court correctly concluded that the Calesnicks' complaint was barred by *res judicata* and collateral estoppel. That is, the Calesnicks raised issues and made claims which the district court could not consider because of the numerous prior actions between the parties. The district court's entry of summary judgment was, therefore, functionally equivalent to the dismissal in *Westminster*. To permit discovery into the 1974 docket entries would be equally wasteful and useless, and should not be permitted.

Moreover, the Calesnicks have been involved in litigation over the Delancey Street properties continuously since 1970. As early as 1976, the Calesnicks alleged impropriety in the amended order and the docket entries in the original state action. Every court that has considered this issue in the various contexts in which it has been raised by the Calesnicks has concluded that there is no substance to their allegations. Counsel for RDA was unable to produce a copy of the amended order of October 10, 1974, because in the routine process of microfilming its outdated records, the common pleas

court destroyed original documents which did not appear significant on their face. This ministerial act should not interfere with sound jurisprudence favoring the finality of prior judicial determinations.

III. The Petitioners Are Not Permitted To Challenge The Propriety Of The District Court's Injunction For The First Time In The Supreme Court

The Calesnicks never raised an objection to the district court's injunction against future litigation in the court of appeals. Absent compelling reasons, the Supreme Court ordinarily does not hear issues not raised on intermediate appeal. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 147 n. 2 (1970); *Duignan v. United States*, 274 U.S. 195, 200 (1927). The Calesnicks have offered no explanation for their failure to appeal the district court's injunction to the court of appeals. Indeed, there can be no explanation other than that the Calesnicks abandoned their objection to the injunction.[7] There is no compelling reason why the appeal should be resumed before the Supreme Court. Therefore, the Supreme Court need not consider the propriety of the district court's injunction.

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7. The Calesnicks do not challenge the district court's power to enjoin Milton A. Calesnick under the All Writs Act, 28 U.S.C. §1651 (1949). Their objection derives from the argument that the complaint was not barred in the first instance.

The district court also awarded $8,102.44 in attorneys' fees to RDA. Although the Calesnicks urge the Supreme Court to grant certiorari in part because of the great financial burden created by the district court's award, the Calesnicks have likewise failed to object to the award of attorney's fees before the court of appeals and do not argue before the Supreme Court that the district court's award was improper in any independent respect.

CONCLUSION

The Calesnicks' petition for writ of certiorari, raising issues which have been decided against them in at least three prior actions and which do not present special and important reasons for review, does not warrant review by the Supreme Court of the judgment of the court of appeals. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned counsel hereby certify that they are members in good standing of the Bar of the Supreme Court.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies hereof have been served upon the interested parties by prepaid first-class certified mail, return receipt requested, on September 7, 1989.

/s/ CARL S. PRIMAVERA
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